

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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| In the Matter of |) | |
| |) | |
| Rules and Regulations Implementing |) | CG Docket No. 02-278 |
| the Telephone Consumer Protection Act of 1991 |) | |
| |) | |
| Comments by ISSA in Support of the Petition for |) | |
| Declaratory Ruling of the Fax Ban Coalition |) | |
| |) | |

TO: The Federal Communications Commission

**FROM: ISSA
 7373 N. Lincoln Avenue
 Lincolnwood, IL 60712**

ISSA respectfully submits these comments in support of the Petition for Declaratory Ruling submitted by the Fax Ban Coalition. That petition seeks a declaratory ruling by the FCC that the Commission has exclusive authority to regulate interstate commercial facsimile messages, and that the Telephone Consumer Protection Act of 1991 (hereinafter “TCPA”) as amended by the Junk Fax Prevention Act of 2005 (hereinafter “JFPA”) preempt Section 17538.43 of the California Business and Professions Code, and all other State laws that purport to regulate interstate facsimile transmissions.

BACKGROUND

ISSA is a non-profit international trade association representing the cleaning industry, and is comprised of over 5,000 distributor, manufacturer,

building service contractor and in-house service provider members. Our membership primarily consists of small businesses that rely extensively on facsimile transmissions to conduct their day to day operations including communicating with their customers and vendors regarding new product offerings, price discounts, seminars, open houses, invoices, purchase orders, and other commercial matters that are critical to their ability to conduct business.

ISSA was an ardent supporter of the JFPA that was enacted by Congress for the specific purpose of permitting businesses and others to transmit commercial faxes to recipients with which they have an established business relationship (hereinafter “EBR”) without the burdensome need for prior written permission. Congress legislated the EBR exception because it found the requirement of signed, written permission prior to fax transmissions to be extremely difficult and unreasonably burdensome for businesses to implement.

Stated simply, the cost of complying with the FCC’s rules on fax transmissions without the EBR would be enormous and would severely hamper legitimate facsimile communications between businesses and their customers and vendors. In lieu of the EBR, the JFPA imposed “opt-out” requirements for faxes. As such, the JFPA represents a common sense balance between the business community’s legitimate need for unfettered

commercial communications and the public's right to not be the target of unsolicited faxes.

UNREASONABLE BURDEN TO BUSINESS COMMUNITY

Despite the enactment of the JFPA, California and other states have adopted laws and regulations that regulate the interstate transmission of facsimile messages. As such, California and other state laws defeat the explicit intent of the TCPA as amended by the JFPA and thereby create an unreasonable burden on the ability of businesses to operate effectively in interstate commerce.

The California law is especially egregious because it applies to any person sending faxes into or out of the State, and it effectively eliminates the EBR exception to the prohibition of unsolicited faxes in the JFPA. Moreover, violators of the California law are subject to injunctive relief, the greater of actual damages or \$500 per occurrence, and treble damages in the case of a willful violation.

In addition, numerous other states have adopted laws that also seek to control the transmission of interstate faxes. Each of these state laws seeks to impose unique and substantial requirements on legitimate business entities as they relate to the sending of interstate faxes and have established their own system of penalties as well.

For businesses and other organizations that do business across state lines, the chaos associated with a multitude of state fax laws makes it

extremely difficult if not impossible to send fax communications without unintentionally violating some provision of the numerous state laws. If every state is allowed to continue to enact conflicting fax laws that apply to interstate faxes, businesses and other organizations will be unnecessarily confused and burdened by the myriad of laws and regulations that impose substantially different requirements. Small businesses simply do not have the resources to research and learn the intricacies of the numerous state fax laws as well as establish workable policies that will allow them to transmit interstate faxes that are compliant across all state jurisdictions that have spoken on this matter.

For example, a fax sent to a recipient in one state may be perfectly legal but may subject the sender to civil or criminal charges in another state. Additionally, given today's prevalence of toll free numbers and the forwarding of calls, a sender of a fax cannot always be certain where a fax may be sent. Consequently, without knowledge of a fax's ultimate destination, a sender may inadvertently and unintentionally violate the law of the jurisdiction in which the fax is ultimately transmitted.

It is apparent that the cost of complying with both a federal statute and numerous conflicting state laws can be huge and extremely burdensome, particularly for small businesses. Moreover, such a scenario unfairly exposes businesses and other organizations to significant legal liability.

FEDERAL LAW PREEMPTS STATE REGULATION OF INTERSTATE FAXES

Furthermore, the TCPA as amended by the JFPA preempts California and other states regulation of interstate faxes. To the extent that they purport to regulate the transmission of faxes across state lines, state laws undermine the intent of Congress, as expressed in the JFPA, to permit interstate commercial faxes to parties with whom the sender has an EBR. While Congress made no specific reference to states lack of authority over interstate fax communications, Congress had no reason to address this issue because it is well established that states lack jurisdiction to regulate interstate communication. Specifically, the Communications Act of 1934 clearly establishes that the FCC has exclusive jurisdiction over all interstate communications.

Moreover, the language of 47 U.S.C. §227(e)(1) also compels the conclusion that Congress did not intend for the states to exercise jurisdiction over interstate faxes. In that paragraph Congress specifically preserved to the states the right to “impose more restrictive intrastate requirements or regulations on, or which prohibit” the use of fax machines to send unsolicited advertisements. It did not grant to the states the authority to impose more stringent requirements on interstate fax communications, a power reserved for the Commission exclusively.

A critical aspect of this statutory provision is its explicit reference to intrastate requirements *only* as being reserved to the domain of states' authority. The inclusion of the specific word "intrastate" to the exclusion of the term "interstate" supports the conclusion that state laws imposing more restrictive interstate requirements are preempted. In effect, the language of the statute compels the conclusion that the TCPA preempts any state regulation of interstate faxes.

CONCLUSION

ISSA urges the Commission to use this opportunity to affirm that it alone has exclusive authority to regulate interstate commercial facsimile transmissions and that it preempts all other state laws that attempt to usurp that authority. In passing the JFPA, Congress crafted a common sense approach that allows all businesses, regardless of the state in which they are located, to have one standard regarding the transmission of interstate commercial faxes. To rule otherwise would allow the proliferation of state fax laws to continue thereby placing an unreasonable burden on the business community and unreasonably impeding interstate commerce.

Respectfully Submitted,

A handwritten signature in black ink that reads "William C. Balek". The signature is written in a cursive, flowing style.

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